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FOUNDED 1866

March 13, 2007

By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW, Washington, DC 20423

Re: Finance Dkt. No. 34797, New England Transrail . . . Petition for Exemption

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, are an original and ten copies of The New York, Susquehanna and Western Railway Corporation's Response to the Supplemental Comments of the New Jersey Department of Environmental Protection in the above-captioned proceeding. A CD containing an electronic version of those comments is also enclosed.

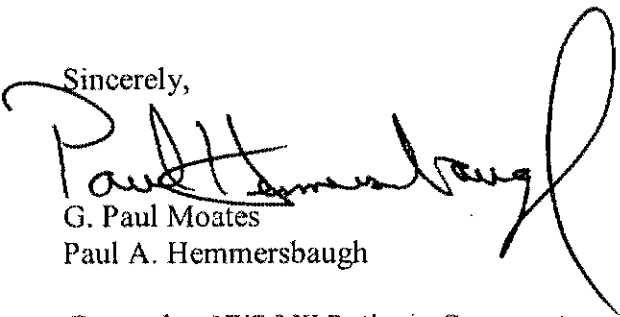
Please acknowledge receipt of the enclosed NYS&W Response Comments by date-stamping the enclosed extra copies and returning them via our messenger. Thank you for your assistance in this matter. If you have any questions, please contact one of the undersigned counsel.

ENTERED
Office of Proceedings

MAR 13 2007

Part of
Public Record

Sincerely,


G. Paul Moates
Paul A. Hemmersbaugh

Counsel to NYS&W Railway Corporation

Enclosures

cc: Parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC,
d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY
PETITION FOR EXEMPTION

**RESPONSE OF THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION TO THE
SUPPLEMENTAL COMMENTS OF THE
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL**

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Counsel to The New York Susquehanna & Western Railway Corporation

Dated: March 13, 2007

NYS&W respectfully submits this response to the Supplemental Comments of The New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission (March 6, 2007) (the “NJDEP Comments”). The NJDEP Comments are erroneous, incomplete, and misleading, and NYS&W believes it is important to correct and clarify the record. In addition, NYS&W wishes to express its agreement with NJDEP’s suggestion that the Board should consider modifying some of its procedures in order to ensure that entities seeking rail carrier status are *bona fide* rail common carriers legitimately engaged in providing rail transportation service. Such procedural modifications would address NJDEP’s central concern, that “rogue operators” will seek to evade state solid waste regulations by claiming they are rail carriers.

I. NJDEP’s Supplemental Comments Regarding the Federal Court Decision Are Incorrect and Misleading.

Following 18 months of litigation (including discovery, multiple hearings and voluminous evidentiary submissions, and extensive post-trial briefing) the federal District Court for the District of New Jersey found that NJDEP’s imposition of onerous regulations on five NYS&W transloading facilities would cause “too large an impact on transportation by rail carriers to pass muster under the police powers exception [to preemption].” *See* Opinion and Order at 35, *NYS&W v. Jackson*, Civ. No. 05-4010 (D.N.J. Feb. 21, 2007).¹ Accordingly, the Court permanently enjoined NJDEP from enforcing those regulations against five specific rail transload facilities operated by NYS&W along its rail lines in northern New Jersey (three of which NYS&W had closed fourteen months earlier in any event). *Id.* As explained below, the

¹ NYS&W previously filed a copy of the federal court’s decision for the Board’s review in this proceeding. *See* G. Paul Moates Letter to STB Secretary Williams (Feb. 21, 2007) (filing copies of decision).

supplemental comments NJDEP filed in this proceeding regarding the *Jackson* decision and its context are materially erroneous.

First, NYS&W's construction and demolition material ("C&D") transloading facilities emphatically are not "rogue" facilities. As the Board is well aware, NYS&W is a bona fide rail common carrier that transports freight in three states over a 400-mile rail network. All existing NYS&W C&D transloading facilities (including facilities not subject to the Order) are enclosed in buildings – none is an "open air" facility.² NYS&W has designed and built those facilities to address and mitigate environmental and public safety concerns, and has worked with NJDEP and NJMC to address their concerns.

NYS&W agreed to substantially "comply" with the substantive requirements of most of NJ DEP's "2D Regulations." And it continues to work to ensure that those facilities and their operations satisfy the goals and aims of those regulations to the fullest extent reasonably possible, notwithstanding the fact that, with respect to the NYS&W facilities in question, those regulations are preempted. *See Jackson* Opinion and Order (holding the 2D Regulations preempted and enjoining NJDEP from seeking to enforce those regulations against five NYS&W facilities). Unlike the "rogue operators" the State fears, NYS&W operates its C&D transloading facilities responsibly and with due regard for the health and safety of the community

² Contrary to NJDEP's suggestion, these two facilities are not "open air" facilities, but enclosed buildings. The loading operations at those, and all other NYS&W C&D transloading facilities in northern New Jersey, take place inside buildings. NJDEP's newly minted allegation that NYS&W's facilities are "open dumps" is flatly wrong. NYS&W has never operated any "open dumps" (a term used to describe sites used for the *permanent disposal* of solid waste, not facilities used to transload bulk material from trucks to rail cars as part of transportation of that material to a distant, licensed and regulated sanitary landfill), and the NJDEP did not allege in the *Jackson* litigation that NYS&W was operating open dumps. *See generally, Jackson*, Second Amended Counterclaim and Third Party Complaint [by NJDEP] (Sept. 15, 2006) (NJDEP complaint consistently refers to the facilities at issue as "transfer stations," in which C&D is "loaded into rail cars" to be "shipped" by rail; no allegation that facilities were "open dumps").

and the environment. Today, after the *Jackson* ruling, NYS&W continues to seek to work cooperatively with NJDEP to address any legitimate concerns it may have regarding the operation of NYS&W's C&D transloading facilities.

Second, NYS&W is not engaged in "processing" of C&D material at its facility. NJDEP made the same allegation in the *Jackson* litigation. The Court's Opinion addressed and rejected that allegation, finding that the evidence demonstrated that the activities that NJDEP alleged were "processing" were instead "*part of the loading process and thus [did] not morph the NYS&W facilities from transload facilities into waste disposal facilities.*" *Jackson* Opinion at 29 (emphasis in original).

Third, NYS&W's C&D facilities pose no significant threat to public health, safety or the environment. In ruling that NJDEP could not apply its extensive solid waste regulatory scheme to NYS&W's transloading facilities and in denying NJDEP's requests for injunctive relief, the federal court rejected the claim that operation of those facilities posed a risk of "irreparable harm." *See, e.g., Jackson* Opinion at 37; Order (Nov. 2, 2005) (denying State's cross-motion for preliminary injunction). Moreover, despite taking extensive discovery and making almost daily inspections of the NYS&W facilities during the federal litigation, NJDEP introduced no evidence in that case showing that those facilities caused harm to public health, safety or the environment.

Fourth, NYS&W wishes to advise the Board that the *Jackson* court summarily denied NJ DEP's motion for stay pending appeal, without even seeking responsive briefing from NYS&W. *See Order Denying Counterclaimants/Third-Party Plaintiffs Request for a Stay Pending Appeal* (March 13, 2007) ("Order Denying Motion for Stay"). Thus, the federal court obviously does not believe "the *Jackson* decision is fundamentally flawed." *Cf. NJ DEP Comments* at 1. In

denying NJ DEP's stay motion, the Court once again rejected claims that NJ DEP has a substantial likelihood of prevailing on appeal and that preemption of the 2D Regulations with respect to the subject transloading facilities poses a risk of irreparable harm.³ See Order Denying Motion for Stay. The Court further amended its February 21 Order to dismiss all of NJ DEP's and NJMC's other miscellaneous claims against NYS&W and its customers. See *Jackson*, Amended Order (March 13, 2007).

The Board need not rely upon NYS&W's description of the *Jackson* rulings, because it has the Court's Opinion and Order available for review. The *Jackson* decision is thorough, careful, and well-reasoned. NYS&W believes that decision, based on a well-developed factual record and extensive legal briefing and argument, is sound as a matter of law and policy. It is confident the Court's decision will be upheld on appeal. The decision also addresses many of the claims and arguments that NJDEP and other commenters have made in this proceeding. Accordingly, NYS&W commends the *Jackson* decision to the Board for its review and consideration.

II. NYS&W Agrees that the Board Should Consider Measures To Ensure That Entities Seeking Rail Carrier Status are Bona Fide Common Carriers.

NJDEP suggests that the Board should revise its exemption procedures to ensure that entities seeking rail carrier status through exemption petitions will be bona fide rail common carriers, and not "a sham intended to take advantage of the preemption provision in 49 U.S.C. § 10501(b)." See N.J. Comments at 3, n. 2. NYS&W agrees that it is important that the Board's

³ NJDEP incorrectly asserts that the *Jackson* decision somehow broadly authorizes "rogue facilities" and "fly-by-night operators" to operate "open air dumps" without regard for public health and safety or the environment. The *Jackson* Order, by its terms, applies only to the five facilities that were at issue in that case. See Order at 2, *NYS&W v. Jackson*. NYS&W has closed and dismantled three of those facilities, so the Order directly applies only to two enclosed facilities.

processes ensure that entities upon which it confers rail carrier status are legitimate, bona fide rail carriers.⁴ The preemption provisions of the Act are intended to facilitate interstate rail transportation, not as a device for entities that are not engaged in common carrier rail transportation to avoid state and local regulation.

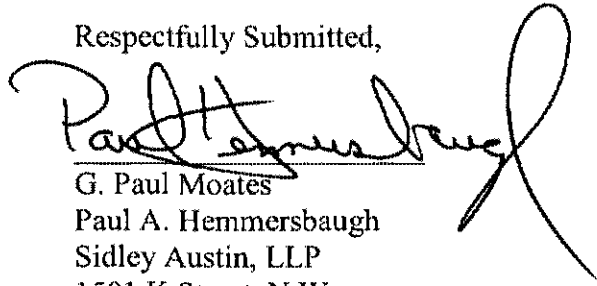
NYS&W also agrees with the Association of American Railroads (“AAR”) and other interested parties that the Section 10901-10902 exemption process should be modified to ensure that the Board and the public have adequate information regarding a proposed new rail operation before an exemption is granted or allowed to take effect. *See, e.g.,* Comments of the AAR, *Public Participation in Class Exemption Proceedings*, STB Ex Parte 659 (May 15, 2006); Comments of Norfolk Southern Railway Company, *Ashland Railroad, Inc. – Lease and Operation Exemption – Rail Line in Monmouth County, NJ*, STB Dkt. No. 34986 (March 5, 2007). If the Board requires parties seeking exemption under Sections 10901 and 10902 to provide more information about their proposed purpose and operations, the Board, interested parties, and the public will be able to make informed evaluations of the proposed exemption. Based upon that information and any comments of interested parties, the Board could limit abuse of the class exemption process, and ensure that only bona fide rail common carriers receive the benefits and protections of the Act.

Such modest changes to the Board’s exemption procedures and process could go a long way toward addressing the concerns of NJDEP and others about inappropriate evasion of state regulatory requirements by solid waste processors and “dumps.” If the Board implements procedures that ensure that only bona fide rail common carriers are subject to the rail carrier

⁴ As the Board knows, NYS&W has been an authorized rail carrier for decades. NYS&W did not use the exemption process to become a rail common carrier. Rather, it obtained a certificate of public convenience and necessity from the ICC after full consideration by the agency.

provisions of the Act, the emerging problem of entities obtaining rail carrier status solely for the purpose of evading state and local regulation could be dramatically curtailed, if not eliminated entirely. Rather than throwing the baby out with the bath water, as NJDEP suggests, NYS&W encourages the Board to work to ensure that its regulatory processes (including class exemption notice proceedings) effectively limit rail carrier status to bona fide rail common carriers engaged in providing rail transportation service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "G. Paul Moates", is written over a horizontal line.

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Of counsel:

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Dated: March 13, 2007

Certificate of Service

I hereby certify that on this thirteenth day of March, 2007, I caused copies of the foregoing **Response of The New York, Susquehanna, and Western Railway Corporation to the Supplemental Comments of the New Jersey Department of Environmental Protection et al**, to be served the parties on the STB's service list by first class mail, postage prepaid or more expeditious method of delivery.

Matthew Wolf